

TO: PPWG – UNIFORMITY COMMITTEE LIAISON GROUP

FROM: ALAN H. FRIEDMAN, CONVENOR

SUBJECT: FEBRUARY 24, 1999 TELECONFERENCE

DATE: FEBRUARY 22, 1999

Attached is my latest effort at a definition of a unitary business enterprise under the Dependency/Contribution test. One is set forth in the disjunctive and one in the conjunctive. On our next call we will be discussing both the wording and the constitutionality/legality of each alternative.

We should also discuss whether the disjunctive test alternative should be passed along the Uniformity Committee at all in light of the concerns expressed regarding its constitutionality. However, should any one or more of the parties (state or business representatives) on the next call **(Wednesday, February 24th at 1:30 PM (Eastern))** wish to pass the disjunctive test on for further consideration, that will happen.

Remember our mission is not to try to argue for one test over another or to prioritize or rank the possible alternatives, although that may well be the nature of a large part of our discussions. Our mission is to articulate the alternative tests (and the major alternatives within each test) the best way we can. No consensus is being sought; but if that happens within our group, great. However, if the members of this group unanimously believe that a proposal is unconstitutional or just plain wrong or without any merit, the group may wish to stop that proposal from being reported out. In any event, any one of us is free to challenge in any later process (before the Uniformity or Executive Committees or the MTC Hearing Officer or before the states individually or elsewhere) any word or part of the definitions that are proposed by this group or elsewhere.

PLEASE NOTE THAT IN THE FUTURE THE MTC'S WEB SITE WILL BE THE METHOD OF DISTRIBUTING THE WRITTEN MATERIALS FOR OUR GROUP. YOU MAY REACH THAT SITE THROUGH WWW.MTC.GOV

I, again, thank you for your good and constructive efforts.

PROPOSED DEFINITION OF DEPENDENCY/CONTRIBUTION TEST

(DISJUNCTIVE)

I. Dependency/Contribution Test for Determining Unitary Business Enterprise.

A. Definitions.

For the purposes of this section, the following definitions shall apply and control:

1. “Business entity” means each type of organization that [this State’s income/franchise law] recognizes as a reporting person, except such term does not include an individual or [insert other applicable exceptions].
2. “Business segment” means any grouping of business activities, functions or transactions.
3. “Enterprise” means a single entity or two or more entities under common ownership or control with respect to which [this State’s income/franchise tax] requires a determination of the unitary businesses being conducted within this State.

B. Dependency/Contribution Test.

1. A business entity (including a business segment thereof) is a member of a unitary business enterprise with another business entity or segment when all of the following circumstances are met:
 - (a) the operation of either business entity or segment is dependent upon or contributes to the operation of the other business entity or segment;
 - (b) the nature of such dependency or contribution is more than *de minimis*; and
 - (b) either business entity directly or indirectly holds an ownership interest in the other; or each business entity is directly or indirectly owned by another person or business entity.

C. Facts and Circumstances; Presumptions.

The determination of whether the operation of a business entity or segment depends upon or contributes to the operation of another shall be determined by the facts and circumstances of each case. It shall be presumed, subject to rebuttal, that sufficient dependency or contribution exists between business entities or segments thereof to form a unitary business enterprise when one or more of the following factors are present:

1. when the principal activities of the business entities or segments are in the same general line of business; or
2. when the entities or segments are engaged in different steps of a vertically structured enterprise; or
3. when there exists a strong centralized management among the entities or segments; or
4. when the business segments are in the same entity.

[Note: There was strong support expressed to eliminate this subparagraph 4. as possibly duplicative of the other three subparagraphs, especially subparagraph 3.]

PROPOSED DEFINITION OF DEPENDENCY/CONTRIBUTION TEST

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I. Dependency/Contribution Test for Determining Unitary Business Enterprise.

A. Definitions.

For the purposes of this section, the following definitions shall apply and control:

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B. Dependency/Contribution Test.

1. A business entity (including a business segment thereof) is a member of a unitary business enterprise with another business entity or segment when all of the following circumstances are met:
 - (a) the operation of either business entity or segment is dependent upon or contributes to the operation of the other business entity or segment; and
 - (b) the operation of the other business entity or segment is either dependent upon or contributes to the operation of the other business entity or segment;
 - (c) the nature of such dependency and contribution is more than *de minimis*; and

(d) either business entity directly or indirectly holds an ownership interest in the other; or each business entity is directly or indirectly owned by another person or business entity.

2. Under the dependency/contribution test, in order to determine whether a unitary business enterprise exists between or among two or more business entities (including business segments thereof), it is not necessary that mutual dependencies or mutual contributions exist. It is only necessary that either (a) one business entity or segment is dependent upon the operation of the other; or (b) that one business entity or segment contributes to the operation of the other; and (c) that the nature of such dependency or contribution is not *de minimis*.

C. Facts and Circumstances; Presumptions.

The determination of whether the operation of a business entity or segment contributes or depends upon the operation of another shall be determined by the facts and circumstances of each case. It shall be presumed, subject to rebuttal, that sufficient contribution or dependency exists between business entities or segments thereof to form a unitary business enterprise when one or more of the following factors are present:

5. when the principal activities of the business entities or segments are in the same general line of business; or
 6. when the entities or segments are engaged in different steps of a vertically structured enterprise; or
 7. when there exists a strong centralized management among the entities or segments; or
 8. when the business segments are in the same entity.
- [Note: There was strong support expressed to eliminate this subparagraph 4. as possibly duplicative of the other three subparagraphs, especially subparagraph 3.]**